INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	13
The National Labor Relations Act, as here applied to this respondent, is a valid exercise of the power of Congress over interstate commerce	15
Conclusion	30

CITATIONS

Cases:	
Addyston Pipe & Steel Corp. v. *United States*, 175 U. S. 211	28
Bedford Cut Stone v. *Stone Cutters' Association*, 274 U. S. 37	18
Chicago Board of Trade v. Olsen, 262 U. S. 1	25, 28
Coronado Coal Co. v. *United Mine Workers*, 268 U. S. 295	18, 21
Duplex Printing Co. v. *Deering*, 208 U. S. 274	18
Federal Trade Commission v. *Algoma Lumber Co.*, 291 U. S. 67	15
Florida v. *United States*, 292 U. S. 1	15
Industrial Association v. *United States*, 268 U. S. 64	21, 26
International Organization v. *Red Jacket C. C. & C. Co.*, 18 F. (2d) 839, certiorari denied, 275 U. S. 536	26
McCall v. *California*, 136 U. S. 104	28
Stafford v. *Wallace*, 258 U. S. 495	17, 25, 28
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420	25
Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks*, 281 U. S. 548	15, 28, 29
United Leather Workers v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457	22, 28
United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344	21, 26
United States v. *Patten*, 226 U. S. 525	22
Statutes:	
Criminal Code, Secs. 135 and 136 (U. S. C., Title 18, Secs. 241, 242)	14
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. I, Title 29, Sec. 151 *et seq.*)	2
Miscellaneous:	
Perlman and Taft, *History of Labor in the United States 1896–1932* (1935 ed.)	16, 26, 29

In the Supreme Court of the United States

OCTOBER TERM, 1936

Nos. 422, 423

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 575–576) is reported in 85 F. (2d) 1. The decisions of the National Labor Relations Board (R. 375–412, 527–564) are reported in 1 N. L. R. B. 411, 432 (1936).

JURISDICTION

The decrees of the United States Circuit Court of Appeals for the Second Circuit were entered July 20, 1936 (R. 576–577). The petition for

writs of certiorari was filed September 30, 1936, and was granted November 9, 1936. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act, as applied to this respondent, is a valid exercise by Congress of its power to regulate commerce among the States.

2. Whether the provisions of Section 8, subdivisions (1), (3) and (4) of the National Labor Relations Act, as applied to this respondent, are consistent with the Fifth Amendment.

3. Whether the provisions of the National Labor Relations Act, as here applied, deprive respondent of the right of trial by jury guaranteed in the Seventh Amendment.

4. Whether the provisions of the National Labor Relations Act, as here applied, deprive respondent of the right of free speech guaranteed by the First Amendment.

STATUTE INVOLVED

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat 449; U. S. C., Sup. I, Title 29, Sec. 151 *et seq.*) is set out as an Appendix to the Board's brief in No. 365, *The Associated Press* v. *National Labor Relations Board,* and is summarized at pp. 3–8 of that brief.

STATEMENT

On September 28, 1935 and November 11, 1935, written charges against the Friedman-Harry Marks Clothing Co., respondent here, were filed with the Regional Director of the Fifth Region of the National Labor Relations Board pursuant to Section 10 (b) of the Act and Article II, Section 2 of the Board's Rules and Regulations. The charges alleged that respondent had engaged in and was continuing to engage in, certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act (R. 11–14, 424–425). Each charge was filed by the Amalgamated Clothing Workers of America, a labor organization (R. 399, 407; 191).

On October 26, 1935, and November 19, 1935, the Regional Director for the Fifth Region issued complaints on the respective charges pursuant to Section 10 (b) of the Act and Article II, Section 5 of the Regulations. These complaints alleged unfair labor practices affecting commeree within the meaning of subdivisions (1), (3) and (4) of Section 8, and subdivisions (6) and (7) of Section 2 (R. 15–23, 426–430). Respondent filed in each case a special appearance objecting to the jurisdiction of the Board on the grounds that the Act, as applied to it, violated Articles I and III of the Constitution and the First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Thirteenth Amendments (R. 25–29, 431–436). Subject to and reserving its

rights under the objection to the jurisdiction of the Board, respondent also filed in each case an answer denying the allegations of violation of the Act (R. 30–32, 437–439).

Both parties agreed at preliminary hearings in No. 422, the first of the two cases, that evidence might be introduced in the form of affidavits or statements to stand uncontradicted by respondent (R. 33–65). A hearing was held in both cases on December 5, 1935, before Henry G. Perring, the trial examiner designated by the Board (R. 24). At that hearing respondent voluntarily waived its right to present testimony or to cross-examine (R. 68), stipulating that the evidence on behalf of the Board might be introduced in the form of affidavits to stand uncontradicted (R. 71–74). Most of the affidavits and exhibits in No. 422 were also introduced in No. 423 (R. 450–452), in addition to oral testimony dealing with the unfair labor practices charged in the second complaint. Thus the evidence in both cases is chiefly in the form of written statements, in large part under oath, and was not objected to by respondent except, in certain instances, as to materiality, relevance or competence.

Thereafter the matter came before the Board pursuant to intermediate reports of the trial examiner, who found that respondent had engaged in unfair labor practices and recommended that an order issue requiring it to cease and desist there-

from (R. 378–379, 530). On March 28, 1936, the Board handed down its decisions setting forth its findings of fact (R. 379–409, 530–562) and the orders here in question (R. 409–412, 562–564). These findings of fact, which are identical in all respects except as to the specific unfair labor practices complained of in each case, may be summarized as follows:[1]

The nature of respondent's business.—Respondent is a Virginia corporation engaged in the sale and distribution of men's clothing, with its principal office and plant at Richmond, Virginia (R. 396; 15, 31). It is a large enterprise; its volume of business having grown from $800,000 in 1933 to $1,750,000 in the first ten months of 1935 (R. 399; 96), and its employees having increased during the same period from 550 to 800 (R. 398; 96).

The principal materials used by respondent in the manufacture of its finished products are woolen and worsted goods, over 99 per cent of which come from States other than Virginia. These materials are fabricated mainly in Massachusetts (50 per cent), Connecticut (10 per cent), Rhode Island (8 per cent), New York (8 per cent), New Jersey (5 per cent) and Pennsylvania (4 per cent). Purchases of 75 per cent of these materials are made

[1] Where the findings are identical a reference will be given only to the finding in the first case. The references in the parentheses preceding the semi-colon are to the findings; the references following the semi-colon are to the supporting testimony and evidence.

pursuant to contracts made in New York City. Immediately after purchase, the goods are shipped to New York City for sponging, and are then forwarded to the Richmond plant. (R. 397–398.) Other materials, such as linings, thread and sewing materials are also purchased and shipped to the Richmond plant almost exclusively from States other than Virginia (R. 397–398; 77–80).

Over 80 per cent of all finished garments made at the Virginia plant are sold and shipped to customers located outside the State of Virginia, chiefly department and men's clothing stores. To facilitate sales, respondent maintains a sales office and show room in New York City where 15 to 20 per cent of all of its sales are made. It also employs eight traveling salesmen who operate in many States, and advertises in certain trade publications. It has a registered trade mark, "Rockingham", for use in interstate commerce (R. 398–399; 90–92, 95).

Respondent's operations reflect those of the industry as a whole.[2] Thus, in 1929 the five New England States of Maine, Vermont, Massachusetts, Rhode Island and Connecticut, from which

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[2] The men's clothing industry is among the 20 most important industries of the nation. In 1929 it was sixteenth in number of wage-earners, nineteenth in value of product, and sixteenth in amount of wages paid. In 1935 it included more than 3,000 firms, directly employing approximately 150,000 workers. The total value of sales of products of the industry in 1929 was $833,242,000. (R. 379; 113–115, 120.)

respondent obtains 68 per cent of its woolen and worsted goods, produced approximately 65 per cent of all men's wear fabrics[3] (R. 383, 397; 136–138). Yet all five of these States produced, in 1929, less than 4 per cent of the men's clothing produced in the United States (R. 383; 138). The principal areas from which other essential materials are obtained, such as rayon and cotton fabrics, silesia for pockets, felt, haircloth, and jute and hemp fabrics, likewise fail to coincide with those States which lead in the fabrication of men's clothing (R. 381–382; 139–143).

Again, like respondent, many enterprises have their men's wear fabrics sponged and shrunk at independent sponging plants centered in New York City and Philadelphia. These operations are there performed upon the cloth while en route from mill to purchaser. (R. 382, 398; 116, 196.)

Interstate movements likewise occur in the course of the actual fabrication of finished garments. While the fabrics are ordinarily cut to shape and size by the purchaser of the cloth, the processes of actual fabrication of the garment—sewing, assembling shoulder pads and canvasses, finishing and pressing—are frequently performed

[3] "Men's wear fabrics" is the term employed in the industry and by the Census of Manufacturers to describe woolen and worsted cloth manufactured for and used by the men's clothing industry. These materials represent 75 per cent of the total cost of the industry's raw materials (R. 380–381; 115, 131, 196).

by independent contractors (R. 383, 384; 117, 121–128, 197–198, 205). It is estimated that about 75 per cent of the output in the New York City area, the principal production center, is fabricated by contractors (R. 382; 197, 264). In no State is the proportion of garments cut the same as the proportion of total man-hours worked (R. 121–128). New Jersey is a striking example of this phenomenon, no doubt because of its proximity to the New York City center (R. 383; 128). Tables in the record describe these variations in detail (R. 121–128).

Distribution of the industry's products extends to every State. (R. 384–385; 148–152, 155–156, 159–160). Over 63 per cent of all sales in the industry are made directly to retailers (R. 385; 145). Many of the leading manufacturers own or are financially interested in retail outlets (R. 385; 158–159, 198–199, 235–243). The explanation for such wide distribution from a restricted fabrication area is found in the fact that transportation costs are a negligible factor in the ultimate price (R. 388; 155, 164–165). Ten cents will more than pay the cost of transporting a suit by fast freight from New York to St. Louis, and the even faster facilities of the parcel post may be utilized, at a cost of only 59 cents, to send a suit from New York across the continent to Los Angeles (R. 164).

Sales to distributors are accomplished chiefly by the two methods utilized by respondent, i. e.,

through the medium of salesmen who travel from State to State, and through the maintenance of show rooms in New York City and other cities for the exhibition and sale of stocks to prospective buyers appearing from all sections of the country (R. 386; 146–148). New York City is the great market place of the industry, and there show rooms and stocks are maintained by most of the industry's substantial firms (R. 386; 198, 232–234). In turn, large purchasers have permanent buying offices there (R. 386; 147). Other cities, such as Chicago and Los Angeles, provide similar although less extensive facilities (R. 386; 147–148). A substantial proportion of the business of the industry is done on a special order basis (R. 146–147). In such a nation-wide distributive system, advertising, frequently of nation-wide character, is a prominent factor, and there is an equally common resort to the use of trade marks (R. 387; 152–153, 199–200).

The unfair labor practices.—In the summer of 1935 the respondent's employees attempted to form a local of the Amalgamated Clothing Workers of America, a labor organization within the meaning of Section 2, subdivision (5) of the Act (R. 399; 191). Meetings were regularly held and memberships actively solicited by interested employees. (R. 399, 400, 402–405, 554–558; 336, 339, 342, 344, 346, 351, 352, 460, 467, 482, 513). Respondent's officials immediately showed great hostility to the

organization (R. 329, 333, 399–400, 514); threatened employees with discharge if they joined the union or attended union meetings (R. 400–401; 366, 475–476, 513); and maintained surveillance over union meetings in various ways (R. 401, 333, 342, 346, 515–516). On June 28, 1935, three employees were discharged for attending a union meeting as an example of what would happen to the rest (R. 400–401; 329, 333). On August 1, 1935, certain employees circulated in the plant, during working hours, a petition expressing loyalty to the company, satisfaction with working conditions, and resentment at union organizers. Failure to sign was regarded as signifying either approval of the union or membership in it. Supervisors assisted in securing signatures, some of which were obtained by threats. (R. 401; 346, 348, 514, 467, 481.) After its circulation the petition was delivered to respondent's president (R. 372).

In the period July to November, 1935, the respondent discharged or laid off the twenty-six employees named in the complaints. Nineteen of these, the Board found, were discriminated against because of their union affiliations. All were union members and most of them had been active in organization work (R. 402–405, 554–558). Many had refused to sign the "loyalty" petition (R. 402–405, 554–558; 336–337, 339, 343–344, 346, 352, 469, 481–482, 487–488); others had signed only after strong persuasion or threats (R. 401; 514, 365).

In eleven of the discharges, respondent's discriminatory motive was clearly expressed, in some instances at the time of discharge (Brock, R. 402, 337–338; Morgan, R. 557–558, 474; Kenny, R. 558, 475–476; Annie Mae Rogers, R. 554, 496), and in other instances at a subsequent meeting of the discharged employees called by the management (R. 558; 490–491, 499–501, 506, 510, 521, 524). Flimsy pretexts, some accompanied by thinly-disguised references to union activity or failure to sign the "loyalty" petition, were utilized in other cases (R. Koch, R. 402, 340; Williams, R. 403, 344; Holder, R. 404, 353; McAden, R. 404, 349; High, R. 556–557, 461–462; D. Koch, R. 557, 524). The clear implications of this testimony were in no way refuted by respondent, who offered no evidence whatever.

Effect of unfair labor practices upon interstate commerce.—Respondent's president stated on September 26, 1935, that the strife created by the controversies here involved had so curtailed respondent's operations that, while it had fabricated 84,000 units in the Spring of 1935, its output in the Fall of that year would not exceed 60,000. He stated further that a fear on the part of one customer in a Western State that respondent could not make delivery because of this dispute, had led to the customer's refusal to give respondent an order for 30,000 units (R. 406–407; 371–372).

Upon the basis of these findings, the Board concluded that respondent, by discharging seven em-

ployees and laying off two in No. 422, and by discharging eleven employees involved in No. 423,[4] had engaged in unfair labor practices within the meaning of subsections (1) and (3) of Section 8 of the Act (R. 409, 562). The Board also found that one of the employees in No. 422 had been discharged because she had participated in filing a charge with the Board, and that respondent had thereby engaged in an unfair labor practice within the meaning of subsection (4) of Section 8 of the Act (R. 409). The Board also concluded that respondent's activities were unfair labor practices affecting commerce within the meaning of subsections (6) and (7) of Section 2 of the Act, in that they tended to lead to labor disputes burdening and obstructing commerce or the free flow thereof (R. 409, 562).

The Board therefore issued an order in each case (R. 409–412, 562–564) requiring respondent to cease and desist from discharges, threats of discharge, and other acts of interference with its employees in the exercise of their rights to self-organization and otherwise as guaranteed in Section 7 of the Act; to offer full reinstatement with back pay to the employees found to have been laid off or discharged in violation of the Act; and to

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[4] One employee, Doris Koch, was named in both complaints, in No. 422 by reason of lay-off, and in No. 423 by reason of discharge (R. 20, 428). Discrimination was found in each case, but reinstatement ordered only in No. 423 (R. 405, 557, 563).

post appropriate notices. The complaint was ordered dismissed for lack of evidence as to certain employees and certain allegations (R. 411–412, 564).

On March 28, 1936, the Board filed in the court below its petitions for the enforcement of the orders it had entered (R. 1–7, 413–419), and filed amendments to the petitions on May 8, 1936 (R. 571–575). The two petitions were consolidated by leave of court (R. 565–567). On July 20, 1936, the court below entered its decrees denying the petitions for enforcement (R. 577).

ARGUMENT

We have shown, in the brief for the Board in No. 365, *The Associated Press* v. *National Labor Relations Board,* that the provisions of the National Labor Relations Act there, and here, involved are a valid exercise of the power of Congress to protect interstate commerce from burdens and injuries, and that they were properly applied, in that case, to an employer engaged in interstate commerce, with respect to his employees who were in, or intimately associated with, that commerce. We have also shown, in that brief, that the provisions of the Act there, and here, involved, do not conflict with the Fifth, Seventh or First Amendments. Finally, we have shown in that brief that the provisions involved in the present cases are separable from

other provisions which have not been invoked, particularly Sections 8 (5) and 9. Accordingly, we respectfully refer the Court to the brief in that case for the discussion of those questions.[5]

Moreover, in the brief for the Board in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* we have set out in detail the power of Congress to control, and consequently to prevent through this Act, industrial strife in the producing or manufacturing divisions of an enterprise largely engaged in and dependent upon the free flow of interstate commerce. Rather than repeat the arguments there advanced in the present brief, we shall only state briefly the legal principles involved, and shall then indicate their application to this respondent, a large enterprise which occu-

[5] In No. 422 the Board found that respondent, by discharging Sara Sheffield because she filed charges under the Act, had engaged in unfair labor practices within the meaning of subsection (4) of Section 8 (R. 409). Sara Sheffield was also found to have been discharged in violation of subsections (1) and (3) of Section 8 (R. 408–409).

Subsection (4) of Section 8 is involved only in this one case, and here only as an alternative basis for the order of the Board. The subsection merely accords to persons filing charges and giving testimony in Board proceedings the protection against influence and intimidation accorded witnesses in judicial proceedings in the Federal courts by Sections 135 and 136 of the Criminal Code (U. S. C., Title 18, Secs. 241, 242). If subsections (1) and (3) of Section 8 are valid, there can be no question of the validity of subsection (4).

pies a prominent place in the manufacture and distribution in interstate commerce of men's clothing.*

THE NATIONAL LABOR RELATIONS ACT, AS HERE APPLIED TO THIS RESPONDENT, IS A VALID EXERCISE OF THE POWER OF CONGRESS OVER INTERSTATE COMMERCE.

The National Labor Relations Act is an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. Experience has shown this strife to be a burden upon commerce not only in its totality, but also because in many individual instances strife eventuated in conspiracies to affect commerce, or otherwise imposed direct and substantial burdens upon it.

Congress, in dealing with the evil of industrial strife, might have approached the problem by a statute designed to remove the burden on interstate commerce after it had evidenced itself in a particu-

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* On the merits of these cases, the Board made detailed findings (R. 399–409, 551–562) with respect to the unfair labor practices engaged in by respondent and concluded that it had discharged a total of eighteen and laid off two employees under circumstances which constituted violations of Section 8, subsections (1), (3) and (4) of the Act. Respondent offered no evidence of any kind. The Act provides that the Board's findings as to the facts, if supported by evidence, shall be conclusive (Section 10 (e)). The evidence clearly supports the findings (*supra* pp. 9–11), and respondent is therefore not in a position to overthrow them. *Florida* v. *United States*, 292 U. S. 1, 12; *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67, 73.

lar case, or it might have enacted a statute designed to eliminate the causes of the burdens in anticipation of their probable effect. The National Labor Relations Act follows the second alternative.[7]

The Act does not, however, attempt to eliminate the causes of industrial strife in *all* enterprises.

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[7] The record in the present case presents much proof of the reasonableness of the means employed by this Act in eliminating the burdens on interstate commerce arising out of industrial strife. See brief for the Board in No. 365, *The Associated Press* v. *National Labor Relations Board*, at pp. 45–69. In the period from 1910 to the present time the industry has been characterized by the gradual acceptance of the procedure of collective bargaining. The Chicago area, for example, suffered from constant labor controversies; only one firm, that of Hart Schaffner and Marx, which had entered into a collective bargaining agreement in 1911 (R. 299) which has been continued to the present time (R. 219, 292, 301) escaped strikes and lockouts (R. 282–286, 291–296, 297–302). However, in 1919 the remainder of the industry in that area entered into an agreement recognizing the rights of organization and collective bargaining similar to the existing agreement with Hart Schaffner and Marx. As a result, the burdens upon commerce resulting from industrial strife have been eliminated in that area (R. 285, 293–296, 301–302).

The New York City area presents a similar history of strikes and lockouts (See Perlman and Taft, *History of Labor in the United States, 1896–1932* (1935 ed.), pp. 315, 435–436, 500–501; R. 309–319). In 1924, however, an agreement similar to that of the Chicago area was adopted (R. 311), and industrial strife has been virtually eliminated (R. 259–260, 265, 285–286, 303, 311, 313, 316–320). Similar results have been obtained in Rochester, Boston, Cincinnati, Cleveland, Baltimore, Philadelphia, and St. Louis (R. 219–220, 267–269, 283–284, 301, 322).

The statute is specifically directed to the elimination of the practices prescribed by Section 8 only when they are found to be "affecting commerce" (Sec. 10 (a)). The phrase "affecting commerce" is defined in Section 2 (7) as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." These jurisdictional limitations, obviously patterned upon the decisions of this Court under the commerce clause, are manifestly a direction to the Board to exercise the national power within the limits permitted by the Constitution.

Thus the validity of any specific application of the preventive measures of this Act depends upon whether industrial strife resulting from the practices in the particular enterprise under consideration would be of the character which Federal power could control if it occurred. If strife in that enterprise could be controlled, certainly it could be prevented. *Stafford* v. *Wallace,* 258 U. S. 495, 525. In the Board's brief in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* at p. 39, we pointed out the three situations in which Congress may exercise its power to control burdens and obstructions on interstate commerce after they have arisen. We submit that in the application of the Act to respondent each of these three situations is presented. Of course,

the existence of any one of the three situations is sufficient to sustain the jurisdiction of the Board.

I

It is well settled that an industrial dispute involving an intent to restrain commerce is within the control power of Congress, even though arising out of local activity. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters' Association*, 274 U. S. 37; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *Loewe* v. *Lawler*, 208 U. S. 274. Consequently, where the situation in a particular enterprise presents the likelihood that a labor dispute, if it occurred, would involve an intent to restrain commerce, then the Board can apply the preventive measures of this statute to that enterprise. It is not claimed in the present case that there is any proof of the existence of an actual intent to affect commerce. However, respondent's enterprise presents a situation in which a labor controversy over employee's basic rights of self-organization and freedom from interference in choice of representatives for purposes of collective bargaining would be likely to involve the purpose not merely by stopping production, but also by interrupting or hindering actual sales and shipments in interstate commerce.

Over 125,000 employees in the men's clothing industry are members of the Amalgamated Cloth-

ing Workers of America, the largest collective bargaining agency in the industry (R. 191, 193). Acting through that labor organization as their representative for collective bargaining purposes, those employees have secured collective agreements which cover the greater part of the industry (R. 219–220). By those agreements, wages have been increased, hours shortened, and other ameliorating standards of employment obtained and maintained (R. 218–220, 206). By them, also, the processes of negotiation and arbitration have been substituted for the strike and lock-out as a peaceful method of solving industrial problems affecting employer and employee. See p. 16, *supra*.

Employees who are members of this organization will not lightly yield to influences endangering the favorable conditions of employment now established and existing in the principal centers of the industry. See footnote 7, p. 16, *supra*. On the contrary, it is only reasonable to assume that they would endeavor effectively to counteract any such dangers. Dangers of the character suggested in fact exist today. They are found principally in a wide-spread movement of enterprises away from the areas in which collective bargaining prevails, with correspondingly high standards of employment, to areas where employees are unorganized and standards of employment are low. Thus there has been, in recent years, a steady decline in number of employees, establishments and production

in New York City, Rochester, Chicago, Baltimore, and Philadelphia—the organized, high-wage and most important centers of the industry—and a corresponding increase in other and unorganized areas (R. 166–67, 171). The chief incentive for this migration unquestionably is the search for lower wages (R. 165–173), for labor cost constitutes 40 per cent of the value added by manufacture (R. 169, 207), and other principal costs are relatively inflexible (R. 162, 169). When viewed in the light of the fact that distance is no obstacle to competition in the industry's main markets, the direct effect of this migration upon the organized areas is plainly evident.

With effective competition between the industry's enterprises an accepted fact regardless of location, and bearing in mind the purpose and effect of the migration of enterprises just discussed, it seems unavoidable that the members of the Amalgamated Clothing Workers should, as they do, regard the industry as one whose economic organization is not based on the interests of each individual enterprise, but is one in which union conditions, to be maintained at all, must prevail generally (R. 192). Industrial strife in respondent's enterprise would, therefore, be likely to have as its object, not merely the application of economic pressure upon respondent, but the cessation of shipments from respondent's plant into the national market, in order to safeguard the organization and

collective bargaining rights in competing enterprises and areas beyond the State of Virginia. *Cf. Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310.

We are not here contending that the circumstances described above establish a valid basis for wage stabilization legislation under the commerce clause. We do contend that such circumstances give rise to a reasonable probability of industrial strife involving the purpose to restrain actual sales and shipments in the channels of interstate commerce, and that they do establish a valid basis for a statute such as this, dealing solely with the problem of labor disputes as they affect the national interest.

We submit, therefore, that there is a reasonable likelihood that industrial strife in respondent's enterprise would, if it occurred, be likely to involve an intent to affect interstate commerce. Accordingly, the Board was justified in holding that the preventive measures of the National Labor Relations Act should be invoked against respondent in order to anticipate that industrial strife which would be within the control power of Congress.

II

This Court has recognized that Congress may exercise control over some industrial disputes even where intent cannot be or is not proven. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410–411; *Industrial Association* v. *United States,*

268 U. S. 64, 81; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, 471. *Cf. United States* v. *Patten*, 226 U. S. 525. The opinions of the Court do not clearly define this category of industrial strife with the necessary effect of substantially burdening interstate commerce. However, in the brief in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, at p. 51, we have suggested three possible constructions which might be adopted: (1) Industrial strife has the necessary effect of burdening or obstructing interstate commerce when it occurs in an enterprise lying within a well-defined "stream" or "flow" of commerce; (2) industrial strife is of that type when its effect would be to restrain a substantial proportion of all the commerce in the particular commodity; or (3) industrial strife is of that type when its effect would be to prevent interstate sales or shipments of a substantial volume of goods which would otherwise move in interstate commerce. We submit that industrial strife in respondent's enterprise would fall within each of these constructions.

It is true that respondent's enterprise is not so clearly within a stream of interstate commerce as that of the Jones & Laughlin Steel Corporation, respondent in No. 419. Nevertheless, we submit that respondent's enterprise may be considered as an integral part of a stream of commerce among the States.

This stream or flow of commerce begins with the movement of the raw wool from the West to the New England States (R. 381). Five States in that area weave over 65 per cent of the principal material for the clothing industry—woolen and worsted cloth (R. 380, 383). Yet the flow does not stop there. Only one of these five New England States is among the eight in which are located 95 per cent of the establishments of the industry, and even that State, Massachusetts, has but 3.6 per cent of the enterprises (R. 383). Most of the cloth moves on in interstate commerce to the centers of the industry such as New York (50.2 per cent of the enterprises), Pennsylvania (10.4 per cent), and Maryland (10.2 per cent) (R. 382–383). This preponderantly interstate movement takes on an added significance from the fact that more than one-third of all woolen woven cloth is made for the men's clothing industry; indeed, it is commonly made to order (R. 115–116, 135, 196).

In many cases the flow of woolens and worsteds passes through an operation intermediate to the weaving and the fabrication of the clothing—the sponging and shrinking. If the clothing manufacturer does not perform this operation at his own plant, his cloth commonly goes from the mill to a Philadelphia or New York sponging plant, and is there reshipped to him (R. 382).

This interstate flow of goods from mill to manufacturer is likewise true to a substantial extent of

many other materials essential to clothing, such as rayon fabrics for lining, silesia for pockets, felt, haircloth and cotton, jute and hemp fabrics (R. 139–143).

Large interstate movements occur even during the actual fabrication of the garments. The purchaser of the cloth commonly cuts the fabric to shape and size, but the actual sewing, finishing and pressing are frequently done in other States. See pp. 7–8, *supra.*

The interstate movement in the distribution of products is, of course, a matter of common knowledge. Seven States account for 90 per cent of the total production of mens' clothing (R. 122) and only 48 per cent of the sales to consumers (R. 122, 150–152, 157). Indeed 21 States produced no industry products whatever, but consumed 12 per cent of the total, valued at over $130,000,000 (R. 156). The explanation for the wide distribution lies in the fact that transportation costs are but a negligible factor in the ultimate price; ten cents will pay fast freight on a suit from New York to St. Louis, and even parcel post costs only fifty-nine cents per suit from New York to Los Angeles (R. 164).

These general characteristics of the industry are, as the statement shows (*supra,* pp. 5–9) characteristic of respondent. Its cloth comes from the New England States, is purchased in New York, stops at a sponging and shrinking plant in that city, and

then arrives at respondent's plant in Virginia. All other materials used in men's clothing (see pp. 7, 24, *supra*), are brought to the plant from points outside Virginia. Respondent does not have contracting work performed for it elsewhere, but its distribution system, consisting of salesmen, a New York City showroom, and national advertising, reaches a national market (R. 91–92). We submit, therefore, that industrial strife in respondent's plant would have the necessary effect of burdening and obstructing commerce within the first construction suggested above (p. 22, *supra*), and is therefore within the control power of Congress. *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Tagg Bros. & Moorhead* v. *United States*, 280 U .S. 420.

If, however, the second suggested definition of industrial strife with the necessary effect of burdening and obstructing interstate commerce be adopted—*i. e.*, strife which has the effect of preventing or disrupting a substantial proportion of all the interstate commerce in a particular commodity, we submit that strife in respondent's plant would be included. Respondent alone, it is true, does not occupy such a position, although it is among the fifty largest enterprises in the industry (R. 120, 212). However, industrial strife in the men's clothing industry, as the record shows, may be expected to spread to other enterprises (R. 267–269, 283–284, 293, 301–302, 309–310; see also

Perlman & Taft, *History of Labor in the United States,* 1896–1932 (1935 ed.) pp. 304–307, 315–316, 435–436, 500). The strong national unions, and the keen competition between the organized and unorganized areas (see pp. 18–21, *supra*) increase the likelihood that strikes will spread to other enterprises and areas, particularly if they have as their basic causes the refusal of employers to allow organization of their employees for collective bargaining and other purposes. Consequently, the Board was justified in applying the preventive measures of the Act to respondent in order to remove the causes of industrial strife which would be apt to spread, by sympathetic action, until a substantial part of all the commerce in men's clothing had been restrained. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Industrial Association* v. *United States,* 268 U. S. 64; *International Organization* v. *Red Jacket C. C. & C. Co.,* 18 F. (2d) 839 (C. C. A. 4th), certiorari denied, 275 U. S. 536.

Inasmuch as we believe that industrial strife within respondent's plant would have the necessary effect of burdening or interrupting interstate commerce within either construction (1) or (2) *supra,* p. 22, we do not consider it necessary to pass upon the third construction suggested—*i. e.,* that industrial strife has the necessary effect of burdening or obstructing interstate commerce if its effect would be to prevent interstate sales or ship-

ments of a substantial volume of goods which would otherwise move in interstate commerce. However, in the event that the Court believes that the facts with respect to respondents' enterprise do not warrant the application of constructions (1) or (2), we discuss construction (3).

Respondent is, compared to the size of other firms in the clothing industry, of relatively large size, being among the fifty largest of the three thousand firms which make up the industry (R. 120, 212). Its sales during the first ten months of 1935 totalled $1,750,000, involving 150,000 units of clothing (R. 95–96). Industrial strife would thus cause the cessation of this large volume of interstate commerce even if confined to respondent's enterprise, which, as we have shown above (*supra*, p. 25), would be unlikely. Even if it were so limited, however, it seems impossible to believe that Congress is powerless to prevent a burden on commerce of that magnitude. As we have shown in the brief for the Board in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, at pp. 77–85, the effect of industrial strife on interstate commerce, even though arising out of local activity, is immediate and would be substantial here. And certainly the cessation of purchases and shipments by an enterprise of the size of respondent's cannot be regarded as without national significance. Nor can the fact that other units of the industry could probably increase production suf-

ficiently to supply the deficiency caused by respondent be determinative of the power of Congress, for the disruption of the channels of commerce, even with no change in the amount of material shipped, is in itself a burden on interstate commerce within the constitutional concern of Congress. *Addyston Pipe & Steel Corp.* v. *United States,* 175 U. S. 211, 243–245; *McCall* v. *California,* 136 U. S. 104, 111.

III

There remains one further ground upon which the order of the Board in the present case may be supported. This Court has on many occasions enunciated the principle that where Congress, after investigation, directs its legislation to the prevention of certain activities which even though usually only of local concern, recur with such frequency as to constitute an undue burden on commerce, those activities may be subjected to the control power of Congress. *Stafford* v. *Wallace,* 258 U. S. 495, 520–521; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 40; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 469. See also *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548.

We have already described, in the briefs for the Board in Nos. 365 and 419, the recurring and widespread character of the burden on interstate commerce resulting from industrial strife in enterprises which receive a substantial part of their ma-

terials from, and send a substantial amount of their products in interstate commerce.[8] We have also described there the close and substantial relationship which industrial strife in such enterprises bears to interstate commerce, the efforts of the Federal government, by various devices, to mitigate it, and the studies made over a long period of years which eventuated in this Act, the basic principles of which have already been sustained by this Court in their application to the prevention of industrial disputes affecting the railroads. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548.

If, as we contend, the control power of Congress extends to recurrent industrial strife in these interstate enterprises, there can be no doubt that the order of the Board in the present case was within its jurisdiction. Respondent is dependent upon the products of States other than Virginia for almost 100 percent of the woolen and worsted goods which it uses (R. 77–78). The same condition prevails with respect to cotton, rayon and silk linings, felt, wigan and cotton tape, Hymo and under-collar

[8] Industrial strife in the men's clothing industry has frequently paralyzed the commerce in men's clothes in whole sections of the country. Such was the effect of each of the three general strikes in the New York area—in 1918, 1920–1921 and 1924—and of the general strike in the Chicago area in 1910–1911. R. 309–310; Perlman and Taft, *History of Labor in the United States*, 1896–1932 (1935 ed.) pp. 304–307, 435–436, 500–501.

cloth (R. 75–80). It can fairly be said that the contribution of Virginia enterprises to the operations conducted at respondent's plant is negligible.

Nor is respondent's market a local one. Over 82 percent of all its sales are made to purchasers located in States other than Virginia, the principal ones being such widely-separated States as Texas, North Carolina, New York, Illinois, Tennessee and Louisiana (R. 91). From 15 to 20 percent of all of its sales are made through the medium of its New York office and sales room (R. 91–92).

We submit, therefore, that industrial strife in respondent's enterprise is of the character which, by its recurrence, comes within the control of Congress under the principle stated above. Consequently, the Board was justified in holding that the preventive measures of the National Labor Relations Act might be invoked against respondent in order to anticipate industrial strife affecting commerce which would be within the control power of Congress.

CONCLUSION

Wherefore, the decrees of the court below should be reversed, and the causes remanded with instruc-

tions to grant the petitions of the Board for the enforcement of its orders.

Respectfully submitted.

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